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LEMBAGA KEMAJUAN TANAH PERSEKUTUAN (FELDA) v. ASRAFAL HJ ALIAN & ORS

HIGH COURT SABAH & SARAWAK, TAWAU
ALWI ABDUL WAHAB J
[SUIT NO: TA-22-35-2011]
B 22 MAY 2018

LEGAL PROFESSION: *Admission – Ad hoc – Appearance of counsel – Preliminary objection against appearance of counsel representing plaintiff in suit – Plaintiff's application for ad hoc admission to enable counsel to practise in Sabah*
C *and to act as leading counsel in appeal before Court of Appeal allowed – Court of Appeal remitted case back to High Court for full trial – Whether ad hoc admission of counsel only to appear in Court of Appeal and not to appear and conduct trial at High Court – Whether subject matters of appeal in Court of Appeal related to subject matters in trial before High Court – Expression 'in any one case or matter'*
D *under s. 10(1) of Advocates Ordinance (Sabah Cap 2) – Whether application for ad hoc admission limited to 'one case' or 'one matter' basis and not a blanket approval*

WORDS & PHRASES: *'in any one case or matter' – Section 10(1) of Advocates Ordinance (Sabah Cap 2) – Appearance of counsel – Court allowed application for ad hoc admission of counsel to practice in Sabah to act as leading counsel in appeal*
E *before Court of Appeal – Whether ad hoc admission limited to 'one case' or 'one matter' basis and not a blanket approval – Whether permitted counsel to act for plaintiff only to appear in Court of Appeal and not to appear and conduct trial at High Court*

F The plaintiff's claim in the original action against the first to fourth defendants was based on trespass to land by the said defendants. In the counterclaim, the first to fourth defendants on behalf of themselves and their representatives were claiming for native customary rights ('NCR') over part of the land alienated to the plaintiff. Having heard the matter, the High Court Judge ('HCJ') decided in favour of the first to fourth defendants and entered
G judgment to award damages. Dissatisfied, the plaintiff appealed to the Court of Appeal against the decision of the High Court in Civil Appeal No: S-01-(W)-83-03-2015. Prior to the hearing of the appeal in the Court of Appeal, the plaintiff filed an application for an *ad hoc* admission to enable senior counsel Dato' Firoz to practise in Sabah and to act as the leading counsel for
H the plaintiff in the appeal before the Court of Appeal, which was allowed, and the order was given on 17 November 2016. Subsequently, the Court of Appeal allowed the plaintiff's appeal, on the ground that O. 33 r. 2 of the Rules of Court 2012 ('ROC') was not the proper procedure for the determination of agreed issues, and ordered the present suit to be remitted
I back to the High Court for a full trial. The first to fourth defendants raised

a preliminary objection and submitted that the order dated 17 November 2016 granting for the *ad hoc* admission was in respect of the permission to practise as lead counsel for the plaintiff in the said appeal at the Court of Appeal and not to appear and to conduct trial in the present suit at the High Court. The first to fourth defendants contended that the said *ad hoc* admission order was incapable of giving such permission to allow Dato Firoz to act for the plaintiff in a full trial of the present suit at the High Court but it merely confined to act for the plaintiff for the purpose of the appeal and any related and subsequent proceedings in the Court of Appeal and all the way up to the Federal Court. On the other hand, the plaintiff contended that the said *ad hoc* admission order contained language that it was general and sufficiently broad so as to include within its scope any order related to or arising out from the Court of Appeal's order, in particular, the order for the present suit to be remitted to the High Court for a full trial. The central issue for this court's determination was on the interpretation of the High Court's order dated 17 November 2016 in granting the *ad hoc* admission to enable Dato Firoz to practise in Sabah and to act as the leading counsel for the plaintiff.

Held (allowing preliminary objection):

(1) It was clearly stated in the *ad hoc* admission order that the *ad hoc* admission was given to Dato Firoz only to represent the plaintiff as its lead counsel in the Civil Appeal No: S-01-(W) -83-03-2015 in the Court of Appeal and in all related proceedings arising from Civil Appeal No. S-01-(W) -83-03-2015 where such subsequent proceedings and appeals are pursued only in the Court of Appeal and the Federal Court. The phrases should be interpreted in a manner consistent to its ordinary and plain meaning. Although the order for the remission of the present suit to the High Court for a full trial arose from the Court of Appeal's order, the subject matters of appeal in the Court of Appeal were not related to the subject matters in a full trial before the High Court. (paras 31, 32 & 36)

(2) The matters on appeal to the Court of Appeal arose from the previous High Court's decision after it decided in favour of the first to fourth defendants based on agreed issues and affidavit evidence pursuant to O. 33 r. 2 of the ROC, whereas the matter in the present suit in the High Court involved a full trial based on *viva voce* evidence on the plaintiff's original action based on trespass and the first to fourth defendants' counterclaim based on NCR and proprietary rights claims over part of the land alienated to the plaintiff. As such, the matters for trial in the present suit were not related to or subsequent to or arising from the said appeal. (para 33)

(3) The expression 'in any one case or matter' under s. 10(1) of the Advocates Ordinance (Sabah Cap 2) gives the meaning that the application for an *ad hoc* admission shall be limited to 'one case' or 'one matter' basis for which the application was made, and not a blanket approval. As the High Court's order dated 17 November 2016 which granted the *ad hoc* admission only permitted Dato' Firoz to act for the plaintiff in the Court of Appeal and the appeal in the Court of Appeal had been concluded on 28 September 2017, the said order could not be now extended to give such permission to Dato Firoz to act and conduct the full trial in the present suit at the High Court. In any event, if the plaintiff so wished for Dato' Firoz to act and conduct the full trial in the present suit at the High Court, a new and fresh *ad hoc* admission had to be obtained. (paras 37 & 40)

Legislation referred to:
Advocates Ordinance (Sabah) (Cap 2), s. 10(1)
Courts of Judicature Act 1964, s. 3
Rules of Court 2012, O. 33 r. 2

For the plaintiff - Tengku Ahmad Fuad Burhanuddin; M/s FT Ahmad & Co
For the 1st to 4th defendants - Kong Hong Ming; M/s Lee & Kong

Reported by Suhainah Wahiduddin

JUDGMENT

Alwi Abdul Wahab J:

Introduction

[1] The trial of the above suit was fixed on 23 April 2018. On that day, Datuk Kong Hong Ming ("Datuk Kong"), the learned counsel for the first to fourth defendants in the original action and also the counsel acting for the same defendants in the counterclaim action raised a preliminary objection ("PO") against the appearance of the learned senior counsel Dato' Firoz Hussein bin Ahmad Jamaluddin (Dato' Firoz") from representing the plaintiff in the present suit. The notice of the intention to object was indicated to the plaintiff *vide* a letter dated 9 April 2018 written by Datuk Kong.

[2] The grounds of the objection by Datuk Kong are listed out in his letter dated 9 April 2018. They are as follows:

(i) The order dated 17 November 2016 which granted the *ad hoc* admission was in respect of the permission to practise as the lead counsel for the plaintiff in the said appeal at the Court of Appeal in Civil Appeal No: S-01-(W)-83-03-2015 and all related proceedings arising therefrom and/ or related to interlocutory and subsequent proceedings and appeals to the Court of Appeal and Federal Court arising therefrom under s. 10(1) of the Advocates Ordinance (Sabah Cap 2).

(ii) The order dated 17 November 2016 which granted the *ad hoc* admission had come to an end upon the final conclusion of the said appeal in the Court of Appeal in Civil Appeal No: S-01-(W)-83-03-2015 on 28 September 2017 when the Court of Appeal set aside the decision of the High Court and remitted back the present suit to the High Court for a full trial.

(iii) The order dated 17 November 2016 which granted the *ad hoc* admission at the Court of Appeal is not applicable to the present suit at the High Court. The matters on appeal to the Court of Appeal were arising from the High Court's decision which was in respect of an application under O. 33 r. 2 of the Rules of Court 2012 ("ROC") whereas the present suit involves a full trial of the plaintiff's action and the first to fourth defendants' counterclaim.

(iv) In the letter dated 15 November 2016 (exh. "FTA5"), the learned senior counsel Dato' Firoz in accepting the appointment as the lead counsel for the plaintiff had made it explicitly clear that his appointment was to act for the appellant (the plaintiff in the present suit) in the said appeal (and all other related appeals – if any).

(v) More significantly, there is nothing in the said *ad hoc* admission order dated 17 November 2016 expressly granting an *ad hoc* admission for the learned senior counsel Dato' Firoz to practise as the lead counsel conducting the trial in the present suit at the High Court.

The Background Facts Leading To The PO

[3] In the present suit, the plaintiff's claim in the original action against the first to fourth defendants is based on trespass to land by the first to fourth defendants.

[4] In the counterclaim, the first to fourth defendants on behalf of themselves and their representative are claiming for native customary rights ("NCR") over part of the land alienated to the plaintiff.

[5] The first to fourth defendants and those parties represented by them also claim that they are the beneficiaries to the estate of the successful applicants of the 650 acres of land alienated to the successful applicants pursuant to three "Offer to Alienated Land" approved on 27 September 1972 and 28 September 1972 by the seventh defendant as Director of Lands & Surveys ("the said offers").

[6] By the said offers, the first to fourth defendants as the representative parties contended in the counterclaim that the successful applicants and their beneficiaries to their estate have the proprietary interest in the said lands.

[7] On 7 March 2014, all the parties in the present suit agreed for the nine issues that arose therein are to be determined by the court under O. 33 r. 2 of the ROC by way of affidavits evidence and the parties' respective bundles of documents.

[8] Having heard the matter, on 13 February 2015, the learned High Court Judge decided in favour of the first to fourth defendants on all the nine agreed issues and entered judgment to award damages for the loss of 650 acres of the said lands. Dissatisfied, the plaintiff appealed to the Court of Appeal against the decision of the High Court in Civil Appeal No.S-01-(W)-83-03-2015.

Application For An Ad Hoc Admission Vide Originating Summons No: BKI-17D-7-11-2016

[9] Prior to the hearing of the appeal in the Court of Appeal, the plaintiff through its counsel, Yang Mulia Tengku Fuad filed an application for an *ad hoc* admission to enable the learned senior counsel Dato' Firoz to practise in Sabah and to act as the leading counsel for the plaintiff in the appeal before the Court of Appeal. The application was made on 3 November 2016 *via* Originating Summons No: BKI-17D-7-11-2016. The application for an *ad hoc* admission was objected to by the first to fourth defendants but was eventually allowed by the High Court which order was given on 17 November 2016.

Court of Appeal – Civil Appeal No: S-01-(W)-83-03-2015

[10] On 28 September 2017, the Court of Appeal allowed the plaintiff's appeal and ordered the present suit be remitted back to the High Court for a full trial. Hence this matter is fixed for that purpose on 23 April 2018 but could not proceed in view of the PO raised by the learned counsel for the first to fourth defendants.

[11] In allowing the plaintiff's appeal, the Court of Appeal did not decide on the merit of the nine agreed issues but its decision was mainly based on technical ground where the Court of Appeal was of the view that O. 33 r. 2 of the ROC was not the proper procedure for the determination of the nine agreed issues without the agreed facts and the agreed bundle of documents.

The First To Fourth Defendants' Submission On The PO

[12] In their main ground in raising the PO, the first to fourth defendants submitted that the order dated 17 November 2016 granting for the *ad hoc* admission was in respect of the permission to practise as the lead counsel for the plaintiff in the said appeal at the Court of Appeal in Civil Appeal No: S-01-(W)-83-03-2015 and not to appear and to conduct trial in the present suit at the High Court.

[13] The learned counsel for first to fourth defendants referred to para. (1) of the said order for *ad hoc* admission dated 17 November 2016 which is stated as follows:

(1) That Dato' Firoz Hussein bin Ahmad Jamaluddin be granted permission to practise as the Lead Counsel for Lembaga Kemajuan Tanah Persekutuan (FELDA) the Appellant in the Court of Appeal Malaysia Civil Appeal No: S-01-(W)-83-03/2015 (Between *Lembaga Kemajuan Tanah Persekutuan (FELDA) v. Asrafal bin Haji Alian & 3 others*) and all related proceedings arising therefrom and/or all interlocutory and subsequent proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom under section 10(c) of the Advocates Ordinance (Sabah Cap 2).

[14] The learned counsel for first to fourth defendants submitted that the phrases "all related proceedings arising therefrom and/or all interlocutory and subsequent proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom" in the above para. (1) of the said order dated 17 November 2016 is only relevant and applicable if there is such related and/or subsequent proceedings arising from the said appeal in the Court of Appeal and the Federal Court.

[15] In support of his contention, he referred to s. 10(1) of the Advocates Ordinance (Sabah Cap 2) which stated as follows:

(c) the Chief Judge may in his absolute discretion upon application by or on behalf of any person who possesses any of the qualifications mentioned in subsection (1) of section 4 grant permission to such person to practise in any one case or matter subject to any conditions he may think fit and to the payment of the prescribed fee if – (i) such person has been instructed by a local advocates; and (ii) having regard to all the relevant circumstances he is of the opinion that it is in the interest of justice so to do.

[16] Pursuant to s. 10(1) of the Advocates Ordinance (Sabah Cap 2) above, the learned counsel for the first to fourth defendants submitted that the permission to practise is limited to "one case" or "one matter". He further submitted that the words "cause" and "matter" are defined under s. 3 of Courts of Judicature Act 1964 ("the Act").

[17] Pursuant to s. 3 of the Act, the word "cause" includes 'any action, suit or other original proceedings between a plaintiff and defendant or any criminal proceedings' whereas the word "matter" includes 'every proceeding in court not in a cause'. The word "case" is not statutorily defined under the Act. The Oxford dictionary gives the meaning of "case" as 'suit' or 'cause'.

[18] The learned counsel for the first to fourth defendants further submitted that based on the definition of the word "cause" or "matter" under s. 3 of the Act, an application via a notice of application for the purpose of O. 33 r. 2 of the ROC is a "matter" and not a "cause" or "case" since it is not an action or suit or original proceeding.

[19] The learned counsel for the first to fourth defendants argued that the expression "in any one case or matter" in s. 10(1) of the Advocates Ordinance is not inserted for no reason but what it really means is that the *ad hoc* admission permission is not a blanket approval and shall only be limited to "one case" or "one matter" for which the application was made and nothing more is to be implied.

[20] Consequently, it was therefore submitted that the order for *ad hoc* admission granted by the learned judge on 17 November 2016 was not a blanket approval for the learned senior counsel Dato' Firoz to practise in all proceedings before any court but only confined to the said appeal in the Court of Appeal and all related and/or subsequent proceedings arising from the said appeal in the Court of Appeal and the Federal Court.

[21] It was further submitted that the said order dated 17 November 2016 granting for the *ad hoc* admission at the Court of Appeal is not applicable to the present suit at the High Court as the matters on appeal to the Court of Appeal were arising from the previous High Court's decision which was in respect of an application under O. 33 r. 2 of the ROC whereas the present suit in the High Court involves a full trial of the plaintiff's action based on trespass and the first to fourth defendants' counterclaim based on NCR and proprietary rights claims over part of the lands alienated to the plaintiff.

The Plaintiff's Submission In Opposing The PO

[22] It was the plaintiff's submission that when the application for an *ad hoc* admission was made then, the plaintiff was contemplating for more additional or subsequent proceedings resulting from any decision or order made by the Court of Appeal. It was for this reason that such *ad hoc* admission order contains language that is general and sufficiently broad so as to include within its scope any re-trial of this matter before the High Court.

[23] The plaintiff further submitted that Civil Appeal No: S-01-(W)-83-03-2015 was the only live proceedings then for which the *ad hoc* admission was granted. This Civil Appeal No: S-01-(W)-83-03-2015 has added to it a series of conjunctive which link those proceedings to other future or potential proceedings. These conjunctive relate to potential prospective proceedings which, depending on the Court of Appeal's orders, may or may not come into fruition and they include:

(i) … all related proceedings arising therefrom (Civil Appeal No: S-01-(W)-83-03-2015) …;

(ii) … and/or all related interlocutory and subsequent proceedings …;

(iii) … and appeals to the Court of Appeal …;

(iv) … and Federal Court of Malaysia arising therefrom ...

[24] For the phrases "… and appeals to the Court of Appeal …", the plaintiff submitted that it must be taken to mean future appeals to the Court of Appeal which, while separate from Civil Appeal No: S-01-(W)-83-03-2015, are nonetheless related to or arise from the latter. Hence, if the said *ad hoc* admission order contemplates future appeals to the Court of Appeal, then logically the said order must also envisage future High Court proceedings from which such appeals may lie.

[25] As regards to the phrases "… all related proceeding arising therefrom …", the plaintiff submitted that it means a proceeding that comes into being or existence as a result of Civil Appeal No: S-01-(W)-83-03-2015 and is connected to the same. Thus, order for re-trial before the High Court by the Court of Appeal in Civil Appeal No: S-01-(W)-83-03-2015 is clearly and squarely falls within the ambit and scope of the said *ad hoc* admission order. This re-trial order is clearly a related proceeding that arises from Civil Appeal No: S-01-(W)-83-03-2015.

[26] On the interpretation of the phrases "… in any one case or matter subject to any conditions he may think fit…" found in s. 10(1) of the Advocates Ordinance (Sabah Cap 2), the plaintiff submitted that the "matter" in question here is the dispute between the plaintiff and the first to fourth defendants. In granting the *ad hoc* admission to Dato' Firoz, the judge has imposed additional conditions in relation to the said *ad hoc* admission which is that Dato' Firoz is also permitted to practise in Sabah in respect of all related proceedings that arise from Civil Appeal No: S-01-(W)-83-03-2015.

The Court's Findings

[27] The central issue for this court's determination is on the interpretation of the High Court's order dated 17 November 2016 in granting the *ad hoc* admission to enable the learned senior counsel Dato' Firoz to practise in Sabah and to act as the leading counsel for the plaintiff.

[28] The phrases "all related proceedings arising therefrom and/or all interlocutory and subsequent proceedings and appeals to the Court of Appeal and Federal Court of Malaysia arising therefrom" as found in para. 1 of the said *ad hoc* admission order has given rise to different interpretation between the plaintiff and the first to fourth defendants.

[29] The first to fourth defendants contended that the said *ad hoc* admission order is incapable of giving such permission to allow Dato' Firoz to act for the plaintiff in a full trial of the present suit at the High Court but it merely confine to act for the plaintiff for the purpose of the appeal and any related and subsequent proceedings in the Court of Appeal and all the way up to the Federal Court.

[30] On the other hand, the plaintiff contended that the said *ad hoc* admission order contains language that is general and sufficiently broad so as to include within its scope any order related to or arising out from the Court of Appeal's order, in particular, the order for the present suit to be remitted to the High Court for a full trial.

[31] This necessitates for the court's determination on the correct interpretation of the said *ad hoc* admission order dated 17 November 2016. Reading through the relevant part of the said *ad hoc* admission order, in particular, para. 1 of the said order, it is clearly stated that the *ad hoc* admission is given to Dato' Firoz only to represent the plaintiff as its lead counsel in the appeal ie, Civil Appeal No.S-01-(W)-83-03-2015 in the Court of Appeal.

[32] In my views the above phrases should be interpreted in a manner consistent to its ordinary and plain meaning. Although the order for the remission of the present suit to the High Court for a full trial arising from the Court of Appeal's order, the subject matters of appeal in the Court of Appeal are not related to the subject matters in a full trial before the High Court.

[33] I am in the agreement with the learned counsel for the first to fourth defendants that the matters on appeal to the Court of Appeal were arising from the previous High Court's decision after it (the previous High Court) decided in favour of the first to fourth defendants based on agreed issues and affidavit evidence pursuant to O. 33 r. 2 of the ROC whereas the matter in the present suit in the High Court involves a full trial based on *viva voce* evidence on the plaintiff's original action based on trespass and the first to fourth defendants' counterclaim based on NCR and proprietary rights claims over part of the lands alienated to the plaintiff. As such, the matters for trial in the present suit are not related to or subsequent to or arising from the said appeal.

[34] The above is fortified by the decision of the Court of Appeal, in allowing the plaintiff's appeal and ordering for the present suit to be remitted and proceeded for a full trial based mainly on the technical ground without considering the merit of the appeal.

[35] I do not agree with the learned counsel for the plaintiff's submission that the said *ad hoc* admission order contemplates future appeals to the Court of Appeal and future High Court proceedings from which such appeals may lie. In my view, the order by the Court of Appeal in remitting the matter to the High Court for a full trial could not have been within the contemplation of all parties since they had agreed to adopt the summary procedure through O. 33 r. 2 of the ROC in the first place.

[36] In my view, based on the ordinary and plain meaning of the said *ad hoc* admission order, it only permits Dato' Firoz to act as the lead counsel for the plaintiff in the appeal namely Civil Appeal No: S-01-(W)-8-03-2015 in the Court of Appeal and in all related proceedings arising from Civil Appeal No: S-01-(W)-8-03-2015 where such subsequent proceedings and appeals are pursued only in the Court of Appeal and the Federal Court.

[37] I also agree with the learned counsel for the first to fourth defendants' submission that the expression "in any one case or matter" under s. 10(1) of the Advocates Ordinance gives the meaning that the application for an *ad hoc* admission shall be limited to "one case" or "one matter" basis for which the application was made and not a blanket approval.

[38] In the ordinary case, the said *ad hoc* admission order must be read and construed in line or consistent with what was sought for by the plaintiff as per the application in the originating summons and the supporting affidavits and there was no material particular in the above plaintiff's documents for the court to consider any *ad hoc* admission for the learned senior counsel to practise at the High Court or at the trial which was not pending then.

[39] The letter from Dato' Firoz himself dated 15 November 2016 (exh. "FTA5") expressly stated that his appointment as the leading counsel to act for the appellant (the plaintiff in the present suit) only for the said appeal in Civil Appeal No S-01-(W)-8-03-2015 (and all other related appeals in the Court of Appeal and Federal Court, if any) and not matters in the present suit in the High Court.

[40] As the High Court's order dated 17 November 2016 which granted the *ad hoc* admission only permitted Dato' Firoz to act for the plaintiff in the Court of Appeal and the appeal in the Court of Appeal has been concluded on 28 September 2017, the said order could not be now extended to give such permission to Dato' Firoz to act and conduct the full trial in the present suit at the High Court. In any event, if the plaintiff so wishes for Dato' Firoz to act and conduct the full trial in the present suit at the High Court, a new and fresh *ad hoc* admission has to be obtained.

Certificate Of Practice Issued By The Learned Deputy Registrar, High Court Dated 16 April 2018

[41] On 16 April 2018, the plaintiff's solicitors ie, Messrs F T Ahmad & Co. applied to the learned Deputy Registrar, High Court at Kota Kinabalu for a "2018 Practicing Certificate" for the learned senior counsel Dato' Firoz relying on the order granting the *ad hoc* admission dated 17 November 2016 in Originating Summons No: BKI-17D-7-11-2016 which was duly issued on the same day.

[42] It must be noted that when the application for the practicing certificate was made on 16 April 2018 to the learned Deputy Registrar, the appeal in the Civil Appeal No S-01-(W)-8-03/2015 has been concluded on 28 September 2017 when the Court of Appeal allowed the said appeal on technicality ground without deciding on the merit of the issues. This fact regarding the disposal of the appeal in Civil Appeal No S-01-(W)-8-03-2015 was omitted before the learned Deputy Registrar.

[43] Thus, it is my view that the "2018 Practicing Certificate" issued to the said learned senior counsel is not valid as the matter for which the certificate was issued had already been concluded and disposed off more than six months ago on 28 September 2017.

Conclusion

[44] Based on the foregoing reasons, the first to fourth defendants' PO is allowed with costs of RM3,000 subject to the payment of allocatur fee.